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Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of Amendment)
of Part 90 Concerning)
the Commission's Finder's)
Preference Rules)

WT Docket No. 96-199

To: The Commission

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**JOINTS COMMENTS OF AIRTOUCH PAGING
AND NATIONWIDE PAGING, INC.**

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SUMMARY

Airtouch Paging ("Airtouch") and Nationwide Paging, providers of local, regional and/or nationwide paging services on private carrier paging frequencies, are commenting on the Commission's Notice of Proposed Rule Making released September 27, 1996, regarding the Amendment of Part 90 Concerning the Finder's Preference Rules.

AirTouch and Nationwide Paging support the elimination of the finder's preference program for all Commercial Mobile Radio Service (the "CMRS") licenses. The monitoring and re-allocation function which the finder's program served is now performed with greater efficiency and flexibility by auction and market area licensing procedures. Continuation of the finder's preference program, would cause complications in the licensing process and interfere with the wide area exclusivity which is a key component of competitive bidding processes. The public interest is not served by these additional complications in licensing. Conversely, consistency in CMRS licensing regulations is furthered by the elimination of this program. Comparable regulatory procedures for all wireless services promote competition among substitutable wireless technologies. For these reasons, the finder's preference program should be eliminated.

**JOINTS COMMENTS OF AIRTOUCH PAGING
AND NATIONWIDE PAGING, INC.**

AirTouch Paging and its affiliates ("AirTouch") and Nationwide Paging, Inc. ("NPI"), by their attorneys, respectfully comment on the Notice of Proposed Rulemaking (the "Notice") released September 27, 1996 in the captioned proceeding. The following is respectfully shown:

I. Preliminary Statement

1. AirTouch and NPI (collectively, the "Joint Commenters") have a substantial interest in this proceeding and a basis in experience for informed comment. AirTouch provides one-way paging and messaging services in 179 markets in 34 states, with over 2.7 million pagers in service. AirTouch's operations include local, regional, and nationwide services offered on private carrier paging ("PCP") frequencies in the 929 MHz band, on which AirTouch has been designated as holding an exclusive license, and, for which the current finder's preference procedures are under review in this docket.^{1/} AirTouch has also been a recurring participant in the Commission auction

^{1/} See Policies Governing the Assignment of Frequencies 47 C.F.R. §90.173(k) (1995). Under current procedures, applicants for licenses in specified land mobile bands receive a dispositive licensing preference for finding unused channels that are ultimately recovered by the Commission.

proceedings.^{2/} Consequently, AirTouch has a meaningful stake in the outcome of the proceeding because it may affect licensing procedures in a band in which AirTouch is heavily invested. Moreover, the company is well situated to comment on the interplay between the finder's preference program and auction procedures.

2. NPI has extensive operations in Southern California, Nevada and Arizona on PCP frequencies, and serves over 110,000 paging customers in these regions of the country. NPI is a party to a proceeding in which a finder's preference has been asserted against a 929 MHz PCP channel previously designated by the FCC as qualifying for local exclusivity.^{3/} Consequently, NPI is well versed in the intricacies of the finder's preference program in this band.

3. The Commission tentatively proposes in the Notice that the finder's preference program defined in Section 90.173(k) be eliminated for the 220-222 MHz, the 470-512 MHz and the 800 and 900 MHz frequency bands. The Joint Commenters support the elimination of the program for all Commercial Mobile Radio Service ("CMRS") services in

^{2/} AirTouch was a participant in the general auction proceeding implementing the omnibus Budget Reconciliation Act of 1993, the Narrowband PCS docket, and the market area licensing docket for paging channels. AirTouch has also participated in both of the narrowband PCS auctions and, as a result, holds one nationwide 50-12.5 kHz license and three regional 50-12.5 khz licenses.

^{3/} NPI knows of no other pending proceeding of this nature, and thus would appear to possess unique insight into the finder's program with reference to PCP channels.

which market area licenses are to be issued by auction.^{4/} This would be another positive step toward achieving regulatory parity^{5/} consistent with the Commission's announced goal of "... establishing a comprehensive and consistent regulatory scheme that will simplify and streamline licensing procedures and provide a flexible operating environment" ^{6/}

4. As is discussed in greater detail below, the finder's preference program can disrupt the efficient operation of a competitive bidding system as a means to ensure productive use of licensed spectrum.

II. The Auction System Supplants the Need for the Finder's Preference Program

5. The public interest is served and the Commission's mission is achieved when spectrum is placed in the hands of licensees who will use it to provide the services for which the spectrum has been allocated. Auctions are now the prevailing licensing methodology being

^{4/} This includes all of the paging frequencies in the 900 MHz band licensed under Part 90 since they may be used for CMRS services.

^{5/} Elimination of the finder's program with regard to Part 90 services would create greater consistency with Part 22 licensing procedures (where finder's preferences have not been recognized) and conform all Part 90 procedures to those recently adopted for the 800/900 MHz band. See 800 MHz Eighth Order and 900 MHz Seventh Order.

^{6/} Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, 11 FCC Rcd 3108 ¶1 (1996). ("Revision of Parts 22 and 90-Paging Systems").

used to achieve this end for wireless services.^{7/} The Commission has strived to craft auction procedures that award licenses on a timely basis to those who value them most highly and are likely to introduce service rapidly to the public.^{8/} In addition, there is an inherent incentive for an auction winner who has paid for spectrum to make immediate and productive use of the frequencies in which it has invested.^{9/} Thus, the auction licensing system diminishes the need for a finder's program to assure frequency utilization.^{10/}

^{7/} See e.g., Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348 (1994).

^{8/} Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 220-222 MHz, PP Docket No.93-253, 11 FCC Rcd 188, 241 ¶ 108 (1995). ("Amendment of Part 90 for 220-222 MHz Band").

^{9/} The Commission has noted that "...since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, and auction design that awards licenses to those bidders with the greatest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum." Id. at 242 ¶ 110.

^{10/} The Joint Commenters, nonetheless, believe that some construction requirements are necessary even in the auction context. The Joint Commenters are concerned that the person who values the spectrum most may do so to warehouse or speculate in the frequency rather than provide service to the public. The Joint Commenters believe that the appropriate remedy when a licensee who wins a license through auction fails to meet construction benchmarks is to have the license returned to the Commission and relicensed in accordance with the auction rules.

6. The finder's preference program was implemented to supplement the Commission's monitoring functions. Its purpose was to provide an incentive to "finders" who report noncompliance in an effort to promote efficient spectrum use.^{11/} This program is now less important in light of the efficacy with which the competitive bidding rules promote maximum utilization of the licensed spectrum.^{12/}

7. In the meantime, continuation of the finder's program runs counter to the free market forces underlying the auction process which the Commission seeks to harness for the public good. While providing an

^{11/} Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, PR Docket No. 90-481, Report and Order 6 FCC Rcd 7297, 7302 ¶30 (1991). ("Finder's Preference Order").

^{12/} As is discussed in greater detail within, there is a difference between single site licensing rules -- the real target of the finders preference program -- and market area licensing. In the single site licensing context, if a licensee fails to construct a site, a finder could discover the failure and propose a site which would provide service over approximately the same area. Finders preference programs, however, do not work well in the context of geographic market area licensing. For instance, currently the PCP channels may be designated for nationwide exclusivity. If a nationwide licensee fails to construct a particular site no harm may occur so long as the licensee has constructed the appropriate number of other sites to meet the rules. If the nationwide licensee fails to meet the entire construction standards it is not clear how the finder could necessarily propose a similar system given that the incumbent would still be allowed to hold the licenses for all facilities which had been constructed. Finally, in the context of a market area licensee receives all territory ceded by the incumbent -- it makes no sense to give the area to a third party.

incentive for licensees to develop their operations quickly, the competitive bidding system also recovers for the public a portion of the value of the spectrum. This benefit would be partially lost were finder's able to continue to garner spectrum for free. Indeed, retaining the finder's preference program could create incentives for parties to initiate overly-aggressive and, in some cases, counterproductive monitoring programs in an effort to avoid having to buy spectrum at auction.^{13/}

A. The Finder's Preference Program is Incompatible with Market Area Licensing.

8. The finder's preference program may interfere with the efficient implementation of market area licensing schemes for CMRS licenses.^{14/} As a general rule, the Commission's auction rules automatically accord, or propose to accord^{15/}, the market area licensee with service rights in any portion of the geographic area ceded by a grandfathered incumbent. These residual rights provide additional incentives for people to participate in the auction and also serve to foster the development of wide

^{13/} See Notice at ¶ 8 in which the Commission reports that only one fourth of the finder's preference requests were granted.

^{14/} Indeed, the Commission proposed to eliminate the finders preference program if it adopts market area licensing. See Revision of Parts 22 and 90 - Paging Systems, supra note 6 at 3113, ¶ 22.

^{15/} Final auction rules governing the 929 MHz paging band are still under consideration. Revision of Parts 22 and 90-Paging Systems supra note 6 at 3124 ¶¶ 75-138.

area systems. This scheme also creates incentives for the auction winner to act as the "finder" within the MTA, BTA or other geographic area for which the license is issued. In this context, a finder's preference program operating for the benefit of third parties could prove counterproductive.^{16/}

9. Public interest considerations support giving the market area licensee the exclusive right to recover unconstructed or non-operational channels on blocks for which it is licensed.^{17/} This right adds value to the auctioned license. If, in contrast, the market area could be invaded by a finder who gets a license for free, the integrity of the market area licensing scheme is diminished. Nationwide licenses, in particular, should be protected from poaching by finder's, particularly during the build out phase.

B. The Exclusive PCP Channels are Ill-Suited to the Finder's Preference Program

10. The finder's preference program was extended to exclusive 929 MHz PCP licenses by a footnote reference in the Commission order which adopted the PCP exclusivity

^{16/} It is unclear how the finders program could work in this context.

^{17/} 800 MHz Eighth Order ¶ 60, 416; 900 MHz Seventh Order ¶ 49. The proposed licensing rules for the 200-220 MHz are similar in concept to those adopted for the 800 and 900 MHz SMR systems. Notice ¶ 9.

program.^{18/} There was, however, no discussion at the time, and there have been no subsequent implementing regulations, establishing the ground rules that govern a preference request filed by a finder with reference to some but not all of the sites of a system for which an exclusivity request is filed. Normally, a finder would only be eligible for a license at a transmitting location in the immediate vicinity of the expired or unbuilt station that the finder identified.^{19/} In some instances, the number of such sites would not be sufficient for the finder to meet the transmitter counts and dispersion requirements necessary to qualify for exclusivity in its own right. No existing rules define how this situation should be handled. The result is a regulatory morass that only breeds litigation, uncertainty expense and delay.^{20/}

18/ Amendment of the Commission's Rules to Provide Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-95, 8 FCC Rcd 8318, 8327 at note 47 (1993).

19/ As mentioned above, a nationwide licensee is not required necessarily to have facilities at any particular location. The nationwide licensee need only have the requisite number of facilities (300) dispersed in accordance with the Rules. If the nationwide licensee fails to construct a facility which was part of the original nationwide license grant, but still meets the requirements of the Rules by constructing an alternate facility within the required timeframes, the nationwide licensee will still have nationwide exclusivity and the finder nothing.

20/ For example, NPI's commercial development of its 929.0125 MHz system in Southern California has been completely disrupted by the long pending finder's preference dispute.

11. Rather than diverting precious resources to resolve these difficult issues at this late date, the better course is for the Commission to simply eliminate the finder's program from the 929 MHz band in its entirety. And, because there is a freeze in place with respect to new 929 MHz applications, pending finders requests should be dismissed without further consideration since a finder's application to reestablish a recovered channel would not be acceptable for filing.

**C. A Finder's Program has No Relevance In
Services that are Subject to A
Substantial Service Construction Standard**

12. The finder's preference program was conceived to assist the Commission in identifying readily ascertainable noncompliance activities such as a failure to build, or discontinuance of service.^{21/} To the extent that fixed construction standards give way to "substantial service" standards under revised CMRS licensing schemes^{22/}, a finder's preference program loses efficacy. If the Commission is willing to adopt flexible construction standards, there is no concrete benchmark against which a

^{21/} Finder's Preference Order, 6 FCC Rcd 7297, 7305 ¶ 49 (Limiting program to violations of construction, placed in operation, and discontinuance of operation rules for which the documentation is straightforward).

^{22/} See e.g., 900 MHz Second Report and Order, at ¶ 4; See also, Construction Requirements 47 C.F.R. §24.203(b) (1995).

finder's showing could be judged.^{23/} In early decisions refining the finder's preference program, the Commission purposefully limited the program to situations in which the challenger was raising compliance issues that could be resolved based upon observable evidence. Where the "substantial service" standard is employed to evaluate a licensee's level of operation, sufficient utilization is not a readily ascertainable fact to an outside observer, and a finder's preference program has no continuing vitality.^{24/}

III. Consistency Among CMRS Licensing Schemes Will Promote Competition

13. Consistent regulations among and between potentially competitive wireless services promote effective competition. As the Commission moves toward allowing licensees greater flexibility in the permissible uses of spectrum within the confines of minimum technical standards, there are more and more instances in which different wireless services can and will become substitutes

^{23/} Maps and documents which demonstrate a geographic coverage or a population saturation or a customer count are all alternatives which have been proposed as evaluators or benchmarks. Amendment of Part 90 for 220-222 MHz Band supra note X at 233-35 ¶¶ 90, 91, 93, 94.

^{24/} AirTouch has previously opposed the use of substantial service tests in the market area licensing context because they breed the exact same problems as the finders preference program generally: litigation, confusion, and diminished licensing certainty. See AirTouch Comments in Market Area NPRM at ¶¶ 20-24.

for one another.^{25/} In these circumstances, it becomes increasingly important for there to be parity in the regulatory schemes which apply, so as not to tilt the market in favor of or against a particular service provider. For this reason, the finder's preference program should be discontinued in the 220-222 MHz, 470-512 MHz, and 929 MHz bands. Previously, the finder's program was invoked most often in the 800/900 MHz SMR frequency band.^{26/} Since it has been eliminated in these bands, no reason remains to retain it elsewhere. There is no compelling reason why the regulatory environment should be unique in regard to monitoring and compliance for any of these services. The public interest will be furthered by eliminating the finder preference program for all the CMRS licensing situations so that competition is not artificially hindered.

IV. Conclusion

WHEREFORE, the foregoing premises having been duly considered, the Joint Commenters respectfully request that Commission formally eliminate the finder's preference

^{25/} The Commission has previously found that Part 22 and Part 90 paging services are virtual substitutes and therefore similar rules should apply. See e.g., CMRS Third Report and Order 9 FCC Rcd 7988, 8026 ¶ 67 (1994)

^{26/} Notice at ¶ 8.

program with respect to all wireless services regulated
under Part 90 of the Commission's rules.

Respectfully submitted,

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